

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**Z.**

**v.**

**IAEA**

**129th Session**

**Judgment No. 4208**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. Z. against the International Atomic Energy Agency (IAEA) on 22 December 2017 and corrected on 9 February 2018, the IAEA's reply of 18 May, the complainant's rejoinder of 17 September 2018, the IAEA's surrejoinder of 9 January 2019 and the documents submitted by the IAEA on 16 August 2019 at the request of the President of the Tribunal and forwarded to the complainant;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision not to select him for a vacant post.

The complainant, a P-4 staff member of the IAEA, applied for the P-5 position of "Senior Safeguards Evaluator" (vacancy notice 2013/046) which was advertised in April 2013. The vacancy notice indicated that there were two positions to be filled. However, the selection process was subsequently cancelled. Two years later, in August 2015, another vacancy was announced (vacancy notice 2015/0335) for a position of "Senior Safeguards Evaluator", at grade P-5. The complainant applied

but was informed in August 2016 that he was not selected. Shortly afterwards, on 31 August 2016, he was placed on certified sick leave until 8 November 2016.

On 23 November 2016 the complainant wrote to the Director General requesting him to review the decision regarding the candidate selection for vacancy notice 2015/0335. He alleged serious irregularities in the selection process. The Director General replied on 19 December 2016 that he agreed to waive the time limit for filing the request for review as the complainant had been on sick leave. The Director General considered that the selection process was conducted in accordance with applicable rules and in keeping with the basic rules of fair and open competition. The complainant lodged an appeal against this decision with the Joint Appeals Board (JAB).

In its report of 31 August 2017 the JAB found no evidence of serious irregularities in the selection process and recommended that the Director General dismiss the appeal. However, it expressed sympathy for the complainant considering that it was difficult to see, based on the report of the interview panel, the justification for rating him as “Qualified” and not “Well Qualified”. It recommended that the Administration give further attention to ensuring that the record of assessment of candidates by interview panels provided a full and accurate description of the assessment of candidates as well as clear reasons for classifying a candidate as “well qualified”, “qualified” or “not qualified”.

By a letter of 26 September 2017 the Director General informed the complainant that he endorsed the JAB’s recommendation and dismissed his appeal. In his view, the interview panel’s decision to rank him as “qualified” was supported by the evidence. The complainant retired on 30 November 2017, before filing his complaint with the Tribunal against the decision of 26 September 2017.

The complainant asks the Tribunal to award him 5,000 euros in compensation for the lost opportunity for career advancement, 10,000 euros in compensation for the moral injury suffered and any other relief that the Tribunal deems fair, just and necessary. He also

claims 2,500 euros in costs with respect to his internal appeal and the proceedings before the Tribunal.

The IAEA asks the Tribunal to reject the complaint as being without merit.

### CONSIDERATIONS

1. The complainant was an unsuccessful internal candidate for the P-5 post of “Senior Safeguards Evaluator” which was advertised by vacancy notice 2015/0335 in August 2015. He was notified of his non-selection in August 2016 and challenged that decision eventually by way of an internal appeal. The impugned decision dated 26 September 2017, which accepted the JAB’s recommendation, dismissed his internal appeal. Before the Tribunal, he contends that there were irregularities in the selection process, particularly in its interview aspect. He also contends that there were flaws in the JAB’s review and in the impugned decision. The IAEA asks that the complaint be dismissed as, in its view, there was no serious defect in the selection process and there were no flaws in the JAB’s review or in the impugned decision.

2. Regarding the basic principles which guide the Tribunal where a non-selection decision is challenged, the following was stated, for example, in Judgment 3652, consideration 7:

“The Tribunal’s case law has it that a staff appointment by an international organisation is a decision that lies within the discretion of its executive head. Such a decision is subject to only limited review and may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence (see Judgment 3537, under 10). Nevertheless, anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right which every applicant must enjoy, whatever her or his hope of success may be (see, *inter alia*, Judgment 2163, under 1, and the case law cited therein, and Judgment 3209, under 11). It was also stated that an organisation must abide by the rules on selection and, when the process proves to be flawed, the Tribunal can quash any resulting appointment, albeit

on the understanding that the organisation must ensure that the successful candidate is shielded from any injury which may result from the cancellation of her or his appointment, which she or he accepted in good faith (see, for example, Judgment 3130, under 10 and 11).”

3. To successfully challenge a non-selection decision, a complainant is required to demonstrate that there was a serious defect in the selection process. The following was accordingly stated in Judgment 3669, consideration 4:

“[...] as the Tribunal observed in Judgment 1827, consideration 6: ‘The selection of candidates for promotion is necessarily based on merit and requires a high degree of judgment on the part of those involved in the selection process. Those who would have the Tribunal interfere must demonstrate a serious defect in it; it is not enough simply to assert that one is better qualified than the selected candidate.’”

However, when an organization conducts a competition to fill a post the process must accord with the relevant rules and the case law. The following was accordingly relevantly stated in Judgment 1549, considerations 11 and 13:

“11. When an organisation wants to fill a post by competition it must comply with the material rules and the general precepts of the case law.

[...]

13. The purpose of competition is to let everyone who wants a post compete for it equally. So precedent demands scrupulous compliance with the rules announced beforehand: *patere legem quam ipse fecisti*. [...]”

4. The complainant summarizes his challenge to the selection process and the internal appeal process that resulted in the impugned decision as follows:

- “1. ‘*Inspector experience*’ was elevated, in the course of the selection process, to a criterion by the [interview] panel, while this was not required by the vacancy notice, in breach of the principle of transparency.
2. My alleged lack of ‘*experience in improving work processes*’ as assessed by the [interview] panel was wrong and unsubstantiated.
3. My education, relevant professional experience and technical skills, which far exceed those of the selected candidates, were not given appropriate attention for the final assessment of my application, in breach of [paragraph] 78(b) of [Part II, Section 3, of the Administrative Manual (AM.II/3)].

4. The selection process was further tainted by procedural irregularities, namely:
  - (a) In the course of the interview, I was not given sufficient time to elaborate on the question referring to my '*experience in improving work processes*', which eventually, was presented to me as a reason why I was ranked as '*qualified*' and not '*well qualified*'. I was, thus, deprived of the opportunity to compete with the other candidates on an equal footing.
  - (b) The composition of the [interview] panel was questionable and, certainly, unusual for a senior staff (P5) position.
  - (c) The vacancy notice advertised one position, while, eventually, two candidates were selected from a limited pool of only four candidates ranked as '*well qualified*'.
5. The [interview] panel failed to draw up an accurate evaluation report.
6. The deficiencies and irregularities mentioned above, in combination with the fact that the evaluation report drawn up by the [interview] panel was incomplete and inaccurate, lead to serious doubts about the impartial and unbiased assessment of my application.
7. The internal appeal process was incomplete and unsatisfactory.”

5. Outside of these pleas, the complainant submits an eighth plea, namely that a breach of confidentiality also occurred as in breach of paragraph 59 of AM.II/3 a member of the interview panel, Mr P., informed him on 19 August 2016 that his application was unsuccessful for reasons which he allegedly gave. The IAEA has not denied the allegation. Paragraph 59 of AM.II/3 relevantly states as follows:

“[...] Except for the results of multiple choice tests referred to in paragraph 4 of Annex III to AM.II/3, at no time during or after the recruitment process shall any information be disclosed to candidates or other persons, inside or outside the Agency, except on a need-to-know basis to those who are participating in the selection process on behalf of the Administration. No information shall be given on the ranking and/or rating of candidates and the recommendation of the Division Director.

Notwithstanding the foregoing, on request, [the Division of Human Resources] will provide relevant recruitment-related information in connection with administrative review processes, i.e. to the Joint Appeals Board or to the International Labour Organization (ILO)'s Administrative Tribunal.”

Given the width of the language in paragraph 59 and the purpose of the provision to prevent members of the interview panel discussing the selection process, the plea is well founded whether or not the selection process had been completed on 19 August 2016 when, on the uncontroverted evidence, Mr P. informed the complainant of his non-selection for the position of Senior Safeguards Evaluator. However, while the breach of confidentiality violated paragraph 59 of AM.II/3, it did not taint the actual selection process as the complainant contends. This is because there is no evidence that the breach of confidentiality had any impact upon that selection process.

6. The complainant's first plea is well founded. He recalls that Mr P. had told him on 19 August 2016 that he was not placed on the list of "well qualified" candidates because, among other things, he lacked inspector experience. He points out that the Administration has not confirmed, denied or addressed that statement but that he is of the view that the statement was genuine as the two selected candidates had been safeguards inspectors. The JAB had stated that it had noted that "inspector experience" did not appear in the complainant's formal assessment by the interview panel but appeared to have been a comment that was made to him afterwards so that it was difficult to assess how the panel may have taken that factor into account. It concluded that there was nothing in the interview panel's report, or otherwise, to suggest that inspector experience was a formal criterion used to assess candidates or that it was a determining factor in the complainant's rating. However, the JAB noted "that the interview panel commented favourably on the inspection experience of three of the four Well-Qualified candidates" and that in one case commented "on '*valuable inspection and evaluation experience*' in another on '*some inspection experience*' and in a third on '*wide inspection experience*'". In conclusion the JAB stated that "[i]nspection experience was indeed emphasised by the interview panel as an asset, although the Vacancy Notice did not specifically request it".

7. In the Tribunal's view, the JAB correctly concluded that the interview panel's report shows that inspector experience was indeed taken into the panel's consideration as an asset in its evaluation of candidates. It was an irrelevant consideration. The vacancy notice had

itself expressly set out the factors which were to be taken into account as assets or advantage and inspector experience was not one of them. The vacancy notice specified as assets: “[k]nowledge of quality management and in particular quality audit and/or performance measurement” and “[p]ractical experience in the development and application of evaluation procedures in safeguards”. It listed fluency in spoken and written English as a requirement, and knowledge of another official IAEA language as an advantage. The finding that inspector experience was an irrelevant consideration cannot be answered by the IAEA’s submissions, which mirror the views stated in the impugned decision, that inspector experience was not a formal or hidden criterion used in the assessment; that the fact that the interview panel in its Appointment Proposal Overview noted that certain candidates had such additional valuable skills simply served to highlight them, even if not required, and that this is justified given that the vacancy notice indicates clear links to activities of a safeguard inspector. Neither is it answered by the IAEA’s submission that the interview panel had clearly stated that its main focus in considering candidates’ aptitudes was that “it placed high importance on candidates’ abilities to lead and manage resources within a matrix management environment, on their detailed understanding of safeguards issues and on their technical understanding and experience with regards to formal evaluation processes and methodologies”.

Given that this finding is sufficient to determine that the selection process was flawed (see Judgments 4001, consideration 13, and 4153, consideration 5), a consideration of the other alleged flaws is unnecessary.

8. The complainant does not seek an order that the impugned decision be set aside nor the cancellation of the appointments which were made from the selection process. As he has not requested that the case be remitted to the IAEA for the Director General to obtain a new recommendation from the interview panel, it will not be remitted. In any event, it would serve no useful purpose as the complainant has retired from the IAEA. The complainant lost an opportunity for the appointment to the position and suffered moral injury. The Tribunal awards, in aggregate, compensation in the amount of 15,000 euros. The complainant will also be awarded 1,000 euros in costs.

DECISION

For the above reasons,

1. The IAEA shall pay to the complainant compensation in the amount of 15,000 euros.
2. The IAEA shall pay the complainant costs in the amount of 1,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 25 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ